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IN THE

SUPREME COURT of the UNITED STATES

DAVID JEFFREY LEE,

Petitioner,

-vs-

STATE OF INDIANA

Respondent

On Petition for Writ of Certiorari
To The Indiana Supreme Court

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QUESTION PRESENTED

Can the police rely upon consent of a co-tenant to seize and search effects such as the content of videotapes that conceal themselves from plain view when the police know that the videotapes belong to another co-tenant and they know the consenting party has never exercised mutual use of the videotapes?

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PETITION FOR A WRIT OF CERTIORARI

OPINONS BELOW

The opinion of the Indiana Supreme Court that is appealed is reported as *David Jeffrey Lee v. State of Indiana,* 849 N.E.2d 602 (Ind. 2006). This Indiana Supreme Court opinion reversed the Indiana Court of Appeals decision which is reported as *David Jeffrey Lee v. State of Indiana,* 826 N.E.2d 131 (Ind.Ct.App. 2005). Both decisions are attached in the Appendix.

JURISDICTION

The Indiana Supreme Court opinion under appeal was entered on June 29, 2006. A timely Petition for Rehearing was filed on July 27, 2006 and was denied on September 22, 2006. A copy of the denial by the Indiana Supreme Court is attached in the Appendix.

CONSTITUTIONAL PROVISIONS INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." [U.S. Const., Amend. IV.]

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law;" [U.S. Const. Amend. XIV.]

STATEMENT OF THE CASE

The State of Indiana filed thirty-six (36) counts of voyeurism against David Lee. On February 18, 2004, David Lee (hereinafter "Lee") filed a motion to suppress

evidence. Lee contended that the police search of his home wherein the police seized and subsequently searched videotapes from his home violated his rights under the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution. The trial court denied Lee's motion to suppress. The trial court certified the denial of the motion to suppress and the Indiana Court of Appeals accepted jurisdiction. The Indiana Court of Appeals unanimously affirmed in part and reversed in part the trial court's decision. The State and Lee both filed petitions for transfer to the Indiana Supreme Court. The Indiana Supreme Court denied Lee's petition for transfer[1] and granted the state's petition for transfer. The Indiana Supreme Court in a 4-1 decision reversed the Indiana Court of Appeals decision and affirmed the trial court's ruling to deny the motion to suppress in its entirety. Lee filed a petition for rehearing which was subsequently denied. Lee petitions this Court to overturn the Indiana Supreme Court's decision.

FACTS

David Lee and his fiancée, Mèlissa Koczur (hereinafter "Koczur") lived together as the sole occupants of a home in Highland, Indiana owned by Lee's mother, Margaret Lee. Lee operated a photography studio in the basement of this home.

The main floor contained the living space in the home. Lee and Koczur slept in the living room of the home. Koczur spent the majority of her time in the living room and the kitchen.

The main floor did have three bedrooms. However, the bedrooms were extremely unkempt The bedrooms were full of clutter which Lee had accumulated over the

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[1] Lee's petition to transfer was a separate challenge under Article 1, Section 11 of the Indiana Constitution. Since there was no challenge under the federal constitution Lee does not raise those issues in this Petition for Writ of Certiorari.

years. Lee had advised Koczur that he preferred that she not enter the bedrooms. However, Koczur did occasionally enter the bedrooms.

On May 10, 2003, Koczur went into the basement to retrieve fertilizer. When she was in the basement, she noticed an open box which contained a number of videocassette players stacked on top of each other. There was a television set next to the videocassette recorders and several videotapes. There were wires also running from the videocassette recorders up towards the dressing room. This set up caused Koczur to become suspicious. Koczur placed one of the videotapes into the videocassette recorder and watched it on the television. The videotape showed a girl changing in the dressing room.

Koczur briefly observed the video tape. She, then, watched two other video tapes on the television which depicted the same girl changing at different angles. Koczur gathered up the three (3) videotapes she observed along with thirteen (13) other videotapes and went to the Highland Police Department.

Koczur was visibly upset when she arrived at the police station due to what she had just discovered in the basement of her home that she shared with Lee. Koczur spoke with Officer Michael O'Donnell of the Highland Police Department. She advised him that she had found some videotapes in her basement that depicted girls being secretly videotaped in the changing room of Lee's photography studio. Specifically, she advised O'Donnell that she had only viewed three (3) of the videotapes and not the other thirteen videotapes. O'Donnell believed that Koczur had obviously just discovered the videotapes.

O'Donnell spoke with the on-call detective, Tim Towasnicki, about what Koczur had just discovered. O'Donnell and Towasnicki went into a separate room and observed some of the videotapes that Koczur had provided to them which depicted what she had reported. A background check was conducted on Lee at the police station and the officers learned that there was an

outstanding warrant for him for failing to appear in Parke County, Indiana.

Koczur agreed to accompany O'Donnell and Towasnicki, along with two other officers, to her home. Lee was home when the group arrived and the two other officers arrested Lee on the warrant and removed him from the home. After Lee was removed from the home, Koczur signed a consent to search form authorizing the police to search "video equipment and electronic devices/computer disks located in the basement studio and surrounding area(s) to include main floor area(s)." In addition, the form authorized the seizure of "any article of property which they consider evidence."

After signing the consent form, Koczur entered the home with O'Donnell and Towasnicki. She directed them to the basement where she had found the videotapes and seen the videocassette recorders stacked on top of each other. The police followed the wires which led from the videocassette recorders to five hidden cameras above the changing room.

While the police were searching the basement, Koczur was talking to them and the police learned that the home was owned by Lee's mother.[2] At this point, Towasnicki stopped the search, because he believed that they needed Lee's mother's consent to search the home. The police contacted Lee's mother and awaited her arrival. When Lee's mother arrived, the officers had her sign the same consent to search form that Koczur had earlier signed.

The officers did not locate any additional videotapes in the basement. The police began to conduct an exploratory search the of the main floor area for videotapes. The police went into the bedrooms which were unlocked. The bedrooms were very unkempt with clothing strewn about, paper all over the floor, overflowing boxes with memorabilia and collection items

[2] At the suppression hearing, there was never any evidence presented that Lee's mother had access or occupied the home. The only evidence was that she owned it.

and hundreds of videotapes with some being labeled and some unlabeled. The police began seizing the tapes which were unmarked like the videotapes that Koczur had provided to them.

Initially, the police viewed some of the videotapes in the home to see whether they contained similar footage. However, there were so many videotapes that it would be impossible to view them all. The police ultimately seized three hundred and sixty-nine (369) videotapes from the home.

The videotapes were removed from the home and viewed to determine whether the videotapes contained similar footage. Koczur created disks for the police of Lee's clients in order to assist them in locating the individuals depicted in the videotapes. The police also used the newspaper to find possible victims. The State eventually charged Lee with thirty-six counts of voyeurism.

O'Donnell or Towasnicki never obtained a warrant at any time. Even though this incident occurred on a weekend, O'Donnell and Towasnicki readily admitted that it would not have been difficult to obtain a warrant. After seizing the videotapes from the home, the police never sought a warrant to view the videotapes removed from the home. In addition, the police never sought Lee's consent.

The police believed that Koczur's consent and Lee's mother's consent was sufficient. The police did not believe a warrant was required to seize the videotapes from the home or subsequently view them at the police station to investigate and charge Lee.

REASONS FOR GRANTING PETITON FOR WRIT OF CERTIORARI

The Fourth Amendment protects "the right of the people to be secure in their person, houses, papers and effects against unreasonable searches and seizures." [U.S. Const. Amend. IV.] This protection has been extended to the states through the Fourteenth

Amendment. [*Mapp v. Ohio,* 367 U.S. 643, 650, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).] "The fundamental purpose of the Fourth Amendment is to protect the legitimate expectations of privacy that citizen's possess in their person, their homes, *and their belongings.* [*Ybarra v. Illinois,* 444 U.S. 85, 91, 100 S.Ct. 338, 342, 62 L.Ed. 238, 245 (1979).]

A search or seizure conducted outside the judicial process, without prior approval of a judge or magistrate, is per se unreasonable subject to a few specifically delineated exceptions. [*Coolidge v. New Hampshire,* 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971).] These exceptions are carefully drawn and the burden is on the party requesting an exception to show the need for it. [*Id.*]

A consent search is a well recognized exception to the warrant requirement. [*Georgia v. Randolph,* _____ U.S. _____, 126 S.Ct. 1515, 1520, 164 L.Ed.2d 208 (2006).] This Court has found that the Fourth Amendment right against "unreasonable searches and seizures" does not have to be waived by a "knowing and intelligent standard" by the person asserting the right. [*Schneckloth v. Bustamonte,* 412 U.S. 218, 241, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).] The Fourth Amendment does not guarantee that a person's house, papers or effects will never be searched without their consent; but, that no search or seizure that occurs will be "unreasonable". [*United States v. Jenkins,* 46 F.3d 447, 454 (5th Cir. 1995).] Thus, consent searches can also be made by third parties under certain limited circumstances. [*United States v. Corral,* 339 F.Supp.2d 781 (W.D. Tx 2004).]

When the government seeks to justify a search based upon a third party's consent, rather than from the person whose property was searched or seized, the government bears the burden of proving that the third party had actual or apparent authority. [*United States v. Matlock,* 415 U.S. 164, 171 fn. 7, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974).] A third party has actual authority when he or she has "mutual use of the property by persons having

joint access or control for most purposes, so that it is reasonable to recognize that any of the co-habitants has the right to permit the inspection in his own right and that the others have assumed the risk." [*United States v. Matlock,* 415 U.S. 164, 171, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974).] A third party has apparent authority to grant consent when the police reasonably, but mistakenly, believe that the facts support actual authority. [*Illinois v. Rodriguez,* 497 U.S. 177, 188, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990).] The validity of a third party consent search is intensely fact-sensitive and a slight variation in the facts may cause the result to vary. [*United States v. Shelton,* 337 F.3d 529, 535 (5th Cir. 2003).]

1. THIS COURT HAS NEVER RENDERED A DECISION REGARDING A CO-TENANT'S AUTHORITY TO CONSENT TO A SEARCH OVER A PERSONAL EFFECT OF ANOTHER.

This Court has never issued much guidance as to what precisely the boundaries are when a co-tenant authorizes an exploratory search of the home for specific effects which the police know belong to the non-consenting co-tenant and the effect has an independent reasonable expectation of privacy. This Court's decisions have primarily dealt with whether the police were authorized by the third party's consent in initially entering the threshold of the home. [*See, Georgia v. Randolph,* _____ U.S. _____, 126 S.Ct. 1515, 1523-1525, 164 L.Ed.2d 208 (2006), holding that the police may not enter a home when one co-tenant authorizes entry and a present co-tenant objects.; ~~*Stoner*~~ *v. California,* 376 U.S. 483, 488, 84 S.Ct. 89, 11 L.Ed.2d 856 (1964), holding that the police were not authorized to search a hotel guest's room based upon the permission of the hotel clerk.; *United States v. Matlock,* 415 U.S. 164, 170, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974), holding that a third party can grant consent to enter and search when there is common authority over the place to be searched; *Illinois v.*

Rodriguez, 497 U.S. 177, 186, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990), holding that consent by a third party is valid when the police reasonably (though mistakenly) believe from the facts that the person has actual authority.]

While this Court's decision in *Frazier v. Cupp,* 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969) discusses third party consent and assumption of the risk, the facts were atypical of a third party consent case where the police seek the consent of one co-tenant to obtain evidence against the other co-tenant and therefore provides little guidance. In *Frazier,* the police suspected Rawls of a crime. The police went to Rawls house and asked him for his clothing. Rawls directed the police to a duffel bag and both he and his mother granted the police consent to search the bag. When the police searched the duffel bag, they discovered evidence which also incriminated Frazier. Prior to the search of the duffel bag, there was no evidence that the police were even seeking evidence against anyone other than Rawls. Frazier was later charged and the evidence found in the duffel bag used against him.

Frazier challenged the search of the duffel bag by contending that the duffel bag belonged to him and Rawls only had permission to use one compartment of the bag so consent was ineffective. [*Frazier,* at 740.] This Court noted that it could dismiss this argument rather quickly. [*Id.*] This Court reasoned that when Frazier allowed Rawls to use the duffel bag and left it at his home that he assumed the risk that Rawls would permit someone else to inspect it. [*Id.*] However, this does not mean that in every situation a person that shares a place or an effect with another surrenders all expectations of privacy.

After *Frazier v. Cupp,* this Court did not simply dismiss Matlock's claim by asserting that he assumed the risk by living in a home with other people. [*United States v. Matlock,* 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974).] Recently, this Court did not dismiss Randolph's claim under the Fourth Amendment when his spouse authorized consent to search while he was present and

objected. [*Georgia v. Randolph*, ____ U.S. _____, 126 S.Ct. 1515, 1523-1525, 164 L.Ed.2d 208 (2006).]

2. A NON-CONSENTING CO-TENANT HAS A AN ADDITIONAL REASONABLE EXPECTATION OF PRIVACY IN EFFECTS IN A SHARED HOME.

A co-tenant's consent to search a home does not necessarily provide authority to search all closed effects in the home. [*Georgia v. Randolph*, ____ U.S. ____, 126 S.Ct. at 1522, *United States v. Karo*, 468 U.S. 705, 726, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984), (O'Connor, J., concurring.] When a third party grants consent to enter and search a home, this usually means that the police now have legal access which provides them vantage points that justify their plain-view searches and seizures. [*United States v. Block*, 590 F.2d 535, 540 fn. 5 (4th Cir. 1978).] Certainly, the police can seize and search effects and containers in the home after they've been granted consent when the effects and containers outward appearances are obvious, such as contraband, a kit of burglar tools or a gun case. [*United States v. Buettner-Janusch*, 646 F.2d 759, 766 (2nd Cir. 1981), *citing*, *Arkansas v. Sanders*, 442 U.S. 753, 764 n. 13, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979).]

Even though the police may have entered a home with consent, effects or closed containers in a home may also have additional reasonable expectations of privacy. [*Buettner-Janusch*, at 765-767, *Block*, at 541-542.] This Court has found that a person has a reasonable expectation of privacy as to the images on 8 mm film independent from what is in plain view on the outside of the 8 mm film package. [*Walter v. United States*, 447 U.S. 649, 655-658, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980).] When closed containers or effects have an independent reasonable expectation of privacy, the police cannot simply rely upon the initial consent, but need to obtain a warrant, obtain additional consent, or show that initial consent also extends to the effect or closed container. [*Buettner-Janusch*, at 765-767, *Block*, at 541-542.] In

order to show that the initial consent to search the home extended to the closed container or effect, which is entitled to an additional reasonable expectation of privacy, the government has the burden of showing the consenting co-tenant had "common authority" over the effect sought to be inspected. [*Matlock,* at 171, *Karo,* at 726 (O'Connor, J., concurring, *United States v. Fultz,* 146 F.3d 1102, 1104 (9th Cir. 1998), *United States v. Welch,* 4 F.3d 761 (9th Cir. 1993), *Buettner-Janusch,* at 765-767, *Block,* at 541-542.]

Lee does not dispute that Koczur had actual authority to grant consent for the police to enter the home that she shared with him. When Koczur consented to the police entering the home, she did not vicariously waive any existing Fourth Amendment right of Lee's. It merely gave the police legal access and provided them with vantage points that would justify plain view searches and seizures. [[*United States v. Block,* 590 F.2d 535, 540 fn. 5 (4th Cir. 1978).] However, Lee would still have a reasonable expectation of privacy in the contents of the videotapes in their shared home. The government must show that Koczur' had common authority to grant consent to seize and subsequently search the videotapes in their shared home.

3. THE INDIANA SUPREME COURT HAS ADOPTED A STANDARD WHICH CONTRAVENES THIS COURT'S PRECEDENT.

The Indiana Supreme Court has departed from this Court's precedent when it concluded that the outcome determining factor in third party consent cases is whether the effect is "personal" or "impersonal". [*See, Krise v. State,* 746 N.E.2d 957 (Ind. 2001); *Halsema v. State,* 823 N.E.2d 668 (Ind. 2005); *Lee v. State,* 849 N.E.2d 602 (Ind. 2006).]

In *Krise,* a male, Tungate, and female, Krise, were living together. The police arrived at the home to serve a civil writ of body attachment on Krise. Krise invited the police into the home to discuss the validity of the writ.

While in the home, the police found a pipe for smoking marijuana. Krise denied knowledge of it and she was removed from the home due to the writ. It was later determined that the writ was stale. After Krise was removed, there was some discussion with Tungate regarding a search of the home. Eventually, Tungate authorized an exploratory search of the home for drugs which was requested due to the finding of the pipe. The police went into a shared bathroom and emptied the contents of a purse. Inside the purse, the police found methamphetamine and Krise's identification. Krise was charged with possession of methamphetamine. She moved to suppress the evidence found as a result of the search of her purse which was conducted without a warrant or her consent. The government relied upon the consent of Tungate.

The Indiana Supreme Court conducted an exhaustive review of warrantless searches. [*Krise*, at 961-965.] The court recognized that there may be overlapping privacy interest in a home, so that consent to search a home may not be effective consent to search a closed container in a home. [*Krise*, at 967-968, *citing United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984), (O'Connor, J., concurring.] It also applied the two step inquiry enunciated in *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) to determine whether there was a reasonable expectation of privacy in a purse. [*Id.*, at 969-970.] Further, the Indiana Supreme Court noted that a closed container like a purse normally holds highly personal items belonging to one person. [*Krise*, at 968-969.]

The Indiana Supreme Court concluded that Tungate's authority to consent to a search did not include Krise's purse. [*Krise*, at 971.] The court reasoned that the evidence show that the purse belonged to a woman and Krise was the only woman living in the home. [*Id.*] Further, there was no evidence that Tungate shared the purse or had mutual use of it. [*Id.*] The Indiana Supreme Court specifically stated that the mere fact that the purse

was located in a common area of the house did not render a reasonable a belief that Tungate had the requisite authority to consent to the search of Krise's purse. [*Id.*]

The Indiana Supreme Court in *Krise* vacated and reversed the Indiana Court of Appeals decision in *Krise* which had upheld the consent search of the purse. The Indiana Court of Appeals believed that Tungate had authority to grant consent to search the purse, because it was located in a shared bathroom which they both had joint access. [*Krise v. State,* 718 N.E.2d 1136, 1142 (Ind.Ct.App. 1999).] Further, it was undisputed that Krise had not taken any actions to place any restrictions on Tungate's access to the purse that was sitting on top of the commode in the shared bathroom.

After *Krise,* a divided Indiana Supreme Court spoke on the issue of third party consent again. [*Halsema v. State,* 823 N.E.2d 668 (Ind. 2005).] In *Halsema,* the defendant and his brother were stopped for a traffic infraction which later resulted in the arrest of the defendant. After the defendant was arrested, the police searched the car and found evidence of drug dealing. The defendant advised the police that he was living at a specific residence. The following day the police went to the residence and spoke with a female occupant.

The woman advised the police that she leased the premises and that the defendant had been staying with her for the past five to seven days. Further, she advised the police that the defendant was staying in her room and that she was sleeping on the couch in the living room. She directed the police to her room where the defendant had been staying and advised them that he was using specific drawers in her dresser. She provided the police consent to search and the police found methamphetamine in the dresser drawer used by the defendant. The defendant was charged with possession and intent to distribute methamphetamine and he moved to suppress the evidence found in the dresser drawer contending that the co-tenant did not have authority to consent to the search of the specific drawer that he was using.

In a divided opinion, the majority concluded that the consenting party did not have authority to consent to a search of the dresser drawer. [*Halsema,* at 677.] The majority reasoned that a dresser drawer is a closed container that normally holds personal items. [*Id.*] Further, the majority reasoned that the police knew from the conversation they had with the consenting party before the search that she did not have joint and/or mutual use of the dresser drawer and it was being used by the defendant. [*Id.*] There was no evidence that she shared the dresser drawer after having given exclusive control of it to the defendant. [*Id.*]

The dissent agreed that a dresser drawer normally holds highly personal items. [*Id.,* at 678.] The dissent, then, chose to ignore the conversation between the consenting party and the police prior to the search. Instead, the dissent focused on the fact that the consenting party had a superior interest in the residence as the lessee and the owner of the dresser and that she could have thrown the defendant and his belongings out at any time, so she had common authority.[3] [*Id.*]

Based upon the *Krise* opinion and the majority opinion in *Halsema,,* Lee moved to suppress the police officer's seizure and subsequent search of videotapes in his shared home which was done based upon Koczur's consent. First of all, Lee pointed out this Court's holding in *Walter* that the contents of videotapes are entitled to a reasonable expectation of privacy. Secondly, the facts indicated that Koczur had not exercised any mutual use over the thirteen videotapes she provided to the police and the 369 videotapes, later, found in the home.

The Indiana Court of Appeals agreed that there was a reasonable expectation of privacy in the contents of videotapes by relying upon *Walter* and that there was a complete lack of evidence that Koczur had ever exercised

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[3] This position runs contrary to what this Court stated in *Matlock* regarding property law. Further, it ignores overlapping privacy rights that the owner of a home may surrender to a guest as discussed in J. O'Connor's concurring opinion in *Karo.*

any control over the thirteen videotapes she provided to the police which she had not viewed and the 369 videotapes, later, found in the home . [*Lee v. State*, 826 N.E.2d 131, 135-136 (Ind.Ct.App. 2005).] The Indiana Court of Appeal's stated, "[i]f third-party consent is insufficient for a container sitting on top of a commode in a room to which the consenting party had access, it must also be insufficient for a container in a room to which Koczur was occasionally locked out of and was told by the person having authority over the room that he preferred that she not enter it." [*Lee*, 826 N.E.2d at 135.] Further, the court noted that the facts appeared to indicate that Koczur was unaware of the existence of any other videotapes in the home other than the videotape she provided to the police. [*Id.*, at 136.]

The Indiana Supreme Court vacated the opinion and reversed the Indiana Court of Appeals in *Lee v. State*, 849 N.E.2d 602 (Ind 2006). The Indiana Supreme Court concluded that it was not convinced that videotapes were a container and even if they were a container that they were not as "personal" as a purse or dresser drawer. [*Lee*, 849 N.E.2d at 608.] In addition, the Indiana Supreme Court, now, concluded that the state did not have the burden to show that Koczur actually exercised mutual use over the videotapes by watching them and that the state could meet is burden by simply showing possible joint access to them. [*Lee*, 849 N.E.2d at 609.]

Lee contends that any distinction between "worthy" and "unworthy" effects is contrary to this Court's precedent. Further, the Indiana Supreme Court has erroneously concluded that the focus is on access to the place and not the actual effect.

This distinction between "worthy" and "unworthy" effects runs counter to this Court's statements in *Robins v. California*, 453 U.S. 420, 101 S.Ct. 2341, 69 L.Ed.2d 744 (1981) wherein this Court concluded that the Fourth Amendment protects "....effects whether they are 'personal' or 'impersonal' ". [*Id.*, at 426.] First of all, there is absolutely nothing in the language of Fourth

Amendment that one certain type of effect is afforded greater protection than another. [*Id.*] Any reference that this Court has ever made that not all containers found by the police during a search will deserve the full protection of the Fourth Amendment have involved effects in "plain view" or containers whose contents can be inferred from their outward appearances. [*Id.*, at 427.] Secondly, if such a distinction were imported into the Fourth Amendment, it is difficult if not impossible to perceive any objective criteria as to what is a "worthy" effect and what is an "unworthy" effect. [*Id.*] The disparate results in decided cases would leave no guidance and only create confusion to judges, police officers or citizens as to what is worthy or unworthy of the Fourth Amendment protection. [*Id.*]

This confusion is obvious in Indiana where a unanimous Court of Appeals and one dissenting justice found videotapes worthy of protection and four justices of the Indiana Supreme Court found such effects unworthy. This worthy and unworthy standard will lead lawyers to craft arguments similar to the one in *Polk v. State*, 822 N.E.2d 239, 242 fn. 1 (Ind.Ct.App. 2005) where the effect or container is portrayed to be personal. The rule enunciated by the Indiana Supreme Court can only lead to confusion to judges, law enforcement and citizens in determining what is worthy and what is unworthy of protection.

The Fourth Amendment protects the owner of every effect that conceals its content from plain view. [*Robbins*, at 428.] This opinion should make it clear that this Court will not recognize distinctions such as the Indiana Supreme Court makes regarding whether the videotapes are containers or not. [*Id.*, at 426-428.] Nothing in the language of the Fourth Amendment indicates that it protects containers. In fact, containers are only afforded protection, because they are repositories for papers and effects. [*Florida v. Jimeno*, 500 U.S. 248, 253, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991), J. Marshall, dissenting.] A "container" is nothing more than a term of

art. As Justice O'Conner stated, "one might say that the telephone line or the space that separates two persons in a conversation, is their jointly owned "container". [*United States v. Karo,* 468 U.S. 705, 726, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984), O'Conner concurring.] There is no need to decide whether a videotape is a container as the Indiana Supreme Court insinuates, because the Fourth Amendment protects effects which conceal their content from plain view.

This Court has concluded that the content of 8 mm film is afforded protection separate and apart from the outward appearance of a box containing 8 mm film. [*Walter v. United States,* 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980).] In *Walter,* a company received a package which some employees opened. The packages contained 8 mm film and the labels on the film contained suggestive drawings and explicit descriptions on them that one would reasonably believe described the content of the 8 mm film. The employees never viewed any of the films. The employees contacted the FBI and the FBI, later, viewed the film without obtaining a warrant.

This Court held that the content of the film was entitled to a reasonable expectation of privacy that society was prepared to recognize. [*Walter,* 447 U.S. at 654.] The owner of the content of the film was entitled to the same protection as an owner of a locked suitcase. [*Id.,* at 658.] The employees never viewed the film, so the owner's reasonable expectation of privacy was never frustrated. [*Id.,* at 658-59.] While the suggestive drawings and explicit descriptions on the box might lead one to believe what was on the film, the use of a projector was needed to determine whether the shipped film actually offended the criminal code. [*Id.,* at 654.] There was nothing wrong with the government's acquisition of the film or its examination of what was in "plain view. [*Id.,* at 656.] However, the additional act of viewing the film constituted a search requiring a warrant or said act needed to fall under an exception to the warrant requirement. [*Id.,* at 657.] There was no warrant nor was

any exception applicable, so the search violated the defendant's Fourth Amendment right against unreasonable searches. [*Id.*, at 657-59.]

Like the content of the 8 mm film in *Walter*, the contents of the videotapes were not in plain view and were afforded the same protection as a locked suitcase. The videotapes were in Lee's home. The police did not know what was on the videotapes nor would Koczur without the use of a videocassette recorder and television set. While the police obtained the videotapes in this case differently than in *Walter*, the police did not obtain a warrant and the only possible exception is whether Koczur had authority to provide consent to seize and search the videotapes.

4. THIS COURT SHOULD DECIDE WHETHER THE GOVERNMENT HAS THE BURDEN OF SHOWING MUTUAL USE OVER AN EFFECT TO RELY ON THE CONSENT EXCEPTION.

The Indiana Supreme Court decided that Koczur had authority to provide valid third party consent, because she had access to the videotapes and could have viewed them at any time. [*Lee*, 849 N.E.2d at 609-610.] In support of this position, the Indiana Supreme Court relied upon *United States v. Duran*, 957 F.2d 499 (7th Cir. 1992) and *State v. Ford*, 83 Ill.App.3d 57, 38 Ill.Dec. 281, 403 N.E.2d 512 (1980). Lee would contend that *Ford* is inapplicable and *Duran* is readily distinguishable.

In *Ford*, the defendant was arrested and during a search of his person certain items were found. These items were taken to the defendant's wife. The defendant's wife placed them in the defendant's tool box. Later, the police believed that these items were evidence. The police visited the wife and she turned the items back over to the police. These facts offer absolutely no credence to the Indiana Supreme Court's position in *Lee*.

In *Duran*, the defendant's spouse was arrested for possessing marijuana. She advised the police that her husband sold large quantities of marijuana in the area.

She signed a consent to search form permitting the police to search her home and outbuildings for marijuana. The police found a large quantity of marijuana in an old farm house.

The defendant moved to suppress the evidence found during the search based on the grounds that his wife's consent was involuntary and that she did not have authority over the farm house. The defendant contended that the spouse did not enter the old farmhouse and none of the spouse's effects were in the old farmhouse.

The Seventh Circuit Court of Appeals held that the spouse had actual authority to permit a search of the old farmhouse. [*Id.*, at 505.] The Court reasoned that it was reasonable for the police to search the farmhouse, because she had access to the farmhouse and whether she exercised it or not is not determinative. [*Id.*] In its analysis, the court decided that a spouse presumptively has authority to consent to a search of all areas of the homestead which the spouse must rebut. [*Id.*] In addition, it stated that in a spousal type situation that the burden on the government should be lighter. [*Id.*] Lee would contend that these last two statements are mere *dicta* and are not accurate statements of what the law is or should be.[4]

The *Duran* case is readily distinguishable from Lee's fact situation. Lee does not challenge the search of a place like the defendant in *Duran* did. The defendant in *Duran* did not contend that the government searched an effect which concealed its content from plain view.

Courts are split on determining whether the government must prove mutual use *and* joint access to show common authority over a place or whether they can simply show just joint access. [*State v. Keiffer*, 217 Wis.2d 531, 577 N.W.2d 352, 359 fn. 13 (1998).] Some courts require a showing of both mutual use *and* joint

[4] Lee will address this argument later. Lee does not believe that the burden of proof is lighter nor is there a presumption. However, he believes that common every day experience of social norms may be a factor that takes into consideration spousal type relationships.

access to a place by the government to meet its burden of showing common authority. [*See, United States v. Whitfield,* 939 F.2d 1071 (D.C.Cir. 1991); *United States v. Davis,* 967 F.2d 84 (2nd Cir. 1992).] On the other hand, some courts have concluded simply a showing of access to the place is sufficient. [*United States v. Duran,* 957 F.2d 499 (7th Cir. 1992); *United States v. Rith,* 164 F.3d 1323 (10th Cir. 1999).] While this split involves access to a place, Lee's case involves mutual authority over an effect.

Courts have almost universally required a showing of "mutual use" when it comes to an effect. [*See, United States v. Basinski,* 226 F.3d 829 (7th Cir. 2000); *United States v. Fultz,* 146 F.3d 1102 (9th Cir. 1998); *United States v. Block,* 590 F.2d 535 (4th Cir. 1978); *United States v. Salinas-Cano,* 959 F.2d 861 (10th Cir. 1992).] In *Basinski,* the defendant had been suspected of criminal activity by the FBI. The defendant turned over a brief case to his good friend and instructed him to destroy it. The friend advised the defendant that he would destroyed the brief case, but really he only hid it in a barn. The FBI learned of this fact and talked to the friend about retrieving the brief case and turning it over to them. The friend advised the FBI that he did not have the combination to the brief case and did not know what was in it.

The friend turned over the brief case to the FBI and they pried it open without ever obtaining a warrant. The brief case contained incriminating evidence that the FBI intended on using against the defendant. The defendant moved to suppress the evidence contending that the friend did not have common authority over the contents of the brief case, so he could not provide valid third party consent.

The Seventh Circuit Court of Appeals agreed and held that the friend did not have common authority over the contents of the brief case in order to provide valid third party consent. [*United States v. Basinski,* 226 F.3d at 835.] The court reasoned that a brief case often holds private papers and effects. [*Id.,* at 834.] It also reasoned

that the government knew that the friend had not exercised any mutual use over the contents of the brief case. [*Id.*, at 835.]

The Ninth Circuit Court of Appeals also focused on the government's knowledge about mutual use over an effect in *United States v. Fultz,* 146 F.3d 1102 (9th Cir. 1998). In *Fultz,* the defendant had been evicted from his apartment. He had been staying with a woman named Kassedyne on and off during that period of time. The defendant became a suspect in a burglary. The police learned that the defendant was staying with Kassedyne. The police requested permission to search Kassedyne's home and she signed a consent to search form.

Kassedyne instructed the police that he kept his belongings in the garage. She directed the police to the garage and told them that his belongings were stacked up against that wall. The defendant's belongings were store in a closed suit case, closed black plastic bags and closed card board boxes. The police found parts of a sawed off shotgun in a closed cardboard box. The defendant was charged with possessing a sawed off shotgun. He moved to suppress the evidence found during the search contending that Kassedyne did not have authority to grant consent to search through his belongings.

The Ninth Circuit Court of Appeals held that Kassedyne did not have authority to permit the police to search through the belongings. [*Id.*, at 1106.] First of all, the court reasoned that there was a reasonable expectation of privacy in the containers holding the belongings. [*Id.*, at 1105.] The government contended that the boxes and bags were not entitled to the same protection as a purse which holds private items. [*Id.*] The Ninth Circuit rejected that argument. [*Id.*] While the court recognized that the type of item may be a factor, it clearly stated that "whether a search is reasonable, depends on *all* the circumstances, not just on whether a container happens to be a suitcase, valise, purse, footlocker, or a cardboard box." [*Id.*]

Since the court had concluded that the containers holding Fultz's belongings were entitled to a reasonable expectation of privacy, it next turned to whether Kassedyne had authority to permit a search of the containers. [*Id.*] The state contended that Kassedyne had access to the garage which would negate any expectation of privacy or that Fultz had assumed the risk that she would permit a search of his belongings stored there. [*Id.* At 1105-06.] The court concluded that access to the garage did not necessarily mean she had access to Fultz's belongings. [*Id.*] In fact, the police were advised before the search that the items against the garage belonged to Fultz. [*Id.*] This knowledge put the police on notice that Kassedyne did not have mutual use of the boxes and bags to consent to search. [*Id.*] Further, Kassedyne stated that she did not use the boxes or have a right to access them. Based upon the circumstances, the police knew Kassedyne did not have mutual use, so she did not have actual authority to consent to the search. [*Id.*, at 1106.]

The government must prove mutual use in order to show common authority over an effect. Joint access is clearly more relevant to a situation involving a place. In *Duran,* the wife granted the police consent to search her shared home and the old farmhouse on the property. While in the old farmhouse, the police found marijuana in plain view. Lee's case is very different. He is not challenging the police entry into a place. He is challenging a search of an effect namely videotapes which require a showing of "mutual use" like the effects in *Basinski* namely a brief case and *Fultz* namely closed cardboard boxes and black plastic bags. The Indiana Supreme court erroneously concluded joint access to a place such as a bedroom where the effects were and whose content was clearly not in plain view was sufficient to show common authority. The Indiana Supreme Court should have required a showing that there was mutual use, i.e. viewing of the videotapes in order to show common authority. As the *Fultz* court noted, it was not access to the garage that counted, but access and mutual

use of the closed containers holding his belongings. The Indiana Supreme Court was correct in *Krise* when it concluded joint access to the bathroom was not enough, but joint access or mutual use of the women's purse was necessary. This same logic should have been applied to the videotapes.

The Indiana Supreme Court's focus should not have been whether the effect was a personal item like a purse or what it arbitrarily decided was an impersonal effect such as a videotape. The outcome determing factor is not whether an effect is personal or impersonal, but whether under *all the circumstances it was reasonable to conclude their was joint and/or mutual use of the effect.*

5. THIS COURT SHOULD FIND THE FOLLOWING FACTORS ARE RELEVANT TO SHOW MUTUAL USE OVER AN EFFECT OR PLACE.

This Court should adopt an objective standard that focus on the "totality of the circumstances" to determine whether it is reasonable for the police to believe that the consenting party has common authority over the particular effect subsequently seized and searched. Such a standard must take into consideration first and foremost a person's reasonable expectation of privacy in his home and in his effects which the Fourth Amendment was enacted to protect. The standard should also be workable for courts, citizens and law enforcement.

Courts have taken into account different factors in assessing the privacy interests of the non-consenting party against legitimate law enforcement relying upon consent of another person to determine whether there is common authority. The first factor is "common experience of life" in assessing reasonableness of privacy expectations. [*United States v. Block,* 590 F.2d 535, 541 (4th Cir. 1978); *United States v. Salinas Cano,* 959 F.2d 861, 864 (10th Cir. 1992).] This was one factor this Court used in reaching its decision in *Georgia v. Randolph* where it stated social custom would dictate that no reasonable person would enter when one co-tenant

objected to the other co-tenant's invitation. [*Randolph,* at 1522-25.] This factor would also include common experience regarding the high value placed upon a purse or briefcase. [*Id.*] In addition, it would take into consideration the relationship between the co-tenants whether there husband-wife or just roommates. One would certainly believe that a spouse could grant permission for another to enter their shared bedroom, but it may not be reasonable to believe that one roommate could grant permission for another to go into the absent roommate's separate bedroom.

Secondly, courts have also taken into account what precautions the owner has taken to protect his privacy. [*Salinas-Cano,* at 864.] This would include locking a door or a brief case. In addition, the owner could forbid others from entering a certain area or prohibiting the use of a particular effect.

Thirdly, courts have also taken into consideration information obtained by the police before the third party granted consent to search as to the consenting party's interest or lack thereof in the area or effect searched. [*United States v. Fultz,* 146 F.3d 1102, 1106 (9th Cir. 1998); *Halsema v. State,* 823 N.E.2d 668, 678 (Ind. 2005).] The person granting consent may tell the police that the area is exclusively used by the absent co-tenant or that he or she doesn't know what is in there, because he or she has never seen it. In addition, a consenting party may tell the police that effect belongs to so and so and I have no idea what it is or what is in there. On the other hand, a consenting party may also tell the police that something belongs to him which isn't true or take actions which would lead the police to believe that person has common authority over the place or item. Since this Court has upheld consent searches based upon reasonable, but mistaken, information, this Court should certainly consider information provided to the police before the search in regards to common authority.

In some circumstances, courts have also determined that the circumstances required "further

inquiry" and the police officer's failure to further inquire necessitated a finding that the state had failed to meet its burden. [*Glenn v. Commonwealth,* 48 Va.App. 556, 633 S.E.2d 205, 215 (Va.Ct.App. 2006); *Norris v. State,* 732 N.E.2d 186, 191 (Ind.Ct.App. 2000); *Illinois v. Rodriguez,* 497 U.S. 177, 188-89, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990.]

No court has ever decided one factor carries more weight than another factor. Decisions have normally been made on a case by case basis. In *Krise,* the common everyday experience that a high expectation of privacy exists in a purse decided the outcome, even though no precautions were taken to manifest privacy in the purse that sat on a commode in a shared bathroom. In *Fultz, Basinski* and *Halsema,* the outcome determining factor was what the consenting party told the police about the use of the particular effect before the search. Courts have also concluded there was no common authority, because the circumstances required further inquiry on the part of the police before proceeding with the search. [*See, Glenn v. Commonwealth,* 48 Va.App. 556, 633 S.E.2d 205, 215 (Va.Ct.App. 2006); *Norris v. State,* 732 N.E.2d 186, 191 (Ind.Ct.App. 2000).]

A court's decision should turn on a balancing of these facts to determine mutual use or common authority. Court should not decide there is a lighter burden in certain situations or that certain rebuttable presumptions arise like the *Duran* court concluded. The burden should always be the same. If the government chooses not to obtain a warrant, then it needs to carry its burden that an exception applies. This burden should never shift and such a position would undermine the preference for a warrant issued by a neutral and detached magistrate; rather, than law enforcement officers.

6. THE GOVERNMENT FAILED TO SHOW THAT KOCZUR HAD MUTUAL USE OVER THE VIDEOTAPES AND THEREFORE, SHE COULD NOT PROVIDE VALID THIRD PARTY CONSENT.

Lee would contend that when these factors are applied to his case that there was no showing of common authority. First of all, the Indiana Supreme Court was wrong to conclude that there was no need to show "mutual use" of the content of the videotapes. As this Court stated in *Walter,* the content of the videotapes was entitled to the same protection as a locked suitcase. The police knew before the search from its conversation with Koczur that she had only viewed three of the sixteen videotapes. The police clearly knew she had no knowledge as to the content of thirteen of the videotapes. This factor should result in the same outcome as the consenting party's lack of access to the contents of the briefcase in *Basinski.* Koczur lacked common authority to permit the police to view the thirteen videotapes that she told the police she had not seen.

The police knew that Koczur lived with Lee before they went to the shared home. Based upon the circumstances, the police knew Koczur had just discovered the videotapes that she had provided to the police, When they entered the home, Koczur directed the police to the basement and not the bedrooms. The record is clear that Koczur did not even know the videotapes, later, found in the bedrooms even existed.

While common everyday experience may not lead one to believe that a videotape has highly private items like a purse, but they may, this does not mean that it is not entitled to protection. As this Court stated in *Walter,* the content of a videotapes is entitled to the same protection as a locked suitcase. The videotapes in the home may not have been hidden away in locked briefcases, but the videotapes were not kept in common areas of the home nor were they kept in the living room by the videocassette recorder for regular household consumption. The videotapes were in the bedrooms where

Lee had instructed Koczur not to enter, and she rarely did. Since Koczur followed Lee's instructions, he may not have felt a need to keep his effects in the bedrooms stored under lock and key. Further, the police knew from the surrounding circumstances that Koczur did not know about the existence of any of videotapes taken from the bedrooms.

The police conducted an exploratory search of the home for additional evidence. The police admit that even when they discovered the videotapes that they could not tell whether any incriminating evidence was on any of the them. Clearly, there was no evidence nor could anybody reasonably conclude that Koczur had ever exercised any mutual use over the videotapes.

Lee had a reasonable expectation of privacy in his home and a reasonable expectation of privacy in the effects in that home. While Lee's reasonable expectation of privacy may be frustrated when a co-tenant, like Koczur, discovered certain effects in that he could be said to have assumed the risk that she may turn those over to the police, his reasonable expectation of privacy in effects in that home which were not discovered by Koczur and kept in rooms to which she rarely entered at his request would not frustrate his reasonable expectation of privacy. Koczur did not know about the videotapes in the bedrooms, so there was no mutual use over the videotapes in the home and, therefore, Koczur had no common authority over them to provide valid third party consent.

7. THE STATE CANNOT RELY UPON APPARENT AUTHORITY, BECAUSE ANY MISTAKE WAS BASED UPON INTERPRETING THE LAW AND NOT ON ANY FACTS AS TO KOCZUR'S ACTUAL AUTHORITY.

Apparent authority applies when the police have a reasonable, but mistaken, belief of a fact or facts regarding the consenting party's actual authority. [*Illinois v. Rodriguez,* 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990).] In *Rodriguez,* the police receive a call to go to a residence where a victim of a beating was

located. When the police arrived, the woman told the police that she had been beaten at the defendant's apartment. The victim referred to the apartment as "ours" throughout the ordeal and agreed to accompany the police to the apartment. The victim let the police in with her key. The police went into the apartment where they located the defendant and discovered a large quantity of cocaine in plain view. The defendant moved to suppress the search on the basis that the victim did not live there at the time she granted the police permission to enter

This Court held that the police can enter a home when they reasonably, but mistakenly, belief the facts warrant actual authority to search. [*Id.*, at 189.] This Court reasoned that the Fourth Amendment protects against unreasonable searches and it is not unreasonable when the police objectively believe that the person authorizing the search has actual authority. [*Id.*]

This Court did make it clear that this doctrine does not apply when the police officers mistaken belief is to what the law requires such as the situation where the police thought a hotel clerk could provide consent to search the hotel room of a guest. [*Id.*, at 188.] Other courts have consistently held that this doctrine only applies to a mistaken belief in the facts giving rise to actual authority and not a mistaken belief as to the law. [*Fultz*, at 1106; *Salinas-Cano*, at 865; *Whitfield*, 939 F.2d at 1073-74.]

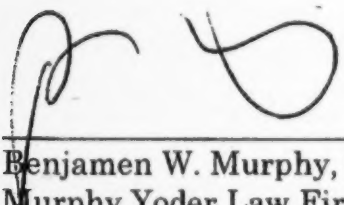
The police did not have any mistaken belief as to the facts regarding Koczur's status in the home or her mutual use or control over the effects. Further, Koczur specifically told the police she had only viewed three of the videotapes that she provided to the police. Any mistaken belief would be in how the law applied to the facts. While the police were in the basement of the shared home, the police discovered that Lee's mother actually owned the home. As a result, the police stopped the search and contacted her to obtain her consent. There belief that Lee's mother's consent was necessary is a mistaken belief as to the law and not facts. As the police

officers stated in this case, they did not believe they needed a warrant. The police officers believed that Koczur's consent to search the house she shared with Lee would include consent to search every effect in the home. This is clearly a mistaken belief in the law and the doctrine of apparent authority in *Rodgriguez* is inapplicable. Apparent authority would not permit a search of the videotapes.

CONCLUSION

While the state argues Lee assumed the risk that the videotapes would be seized and searched, the police also assumed a risk when they made the conscious choice to proceed on Koczur's consent and not obtain a warrant. It is rather interesting that the police could stop the search in order to wait for Lee's mother, but not stop to obtain a warrant. By the officer's own admission, they could have obtained a warrant, but did not believe it was necessary. From the totality of the circumstances, it was quite clear the police knew Koczur had not exercised any authority over any of the videotapes found in the home or the thirteen video tapes provided to the police. Koczur told the police she had not viewed the thirteen tapes. The evidence clearly shows she was unaware of the other tapes taken from the home and later searched by the police. When the police went into the bedrooms, they could not tell whether the videotapes provided any incriminating evidence. Koczur had never exercised any control or mutual use over those videotapes and the police knew it. Since Koczur had never excercised any mutual use or control over the tapes, Lee's reasonable expectation of privacy in the contents of the video tapes was not frustrated. The police assumed the risk by not obtaining a warrant and relying on Koczur's consent which ultimately fails. This Court should grant Lee's Petition for Writ of Certiorari, reverse the Indiana Supreme Court and remand this matter to the trial court with instructions to suppress the use of the videotape evidence against Lee.

Respectfully submitted,



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In the
Indiana Supreme Court

No. 45S05-0510-CR-454

DAVID JEFFREY LEE

Appellant (Defendant below),

v.

STATE OF INDIANA

Appellee (Plaintiff below).

Appeal from the Lake Superior Court, No. 45G01-0306-FD-00113
The Honorable Salvador Vasquez, Judge

On Petition To Transfer from the Indiana Court of Appeals, No. 45A05-0405-CR-267

June 29, 2006

Boehm, Justice.

Facts and Procedural History

In the spring of 2003, David Lee and his fiancée, Melissa Koczur, lived in a house in Highland, Indiana, owned by David's mother, Margaret Lee. David operated a photography studio in the basement of their home. On May 10, 2003, Melissa went to the basement to get some fertilizer and noticed five videocassette recorders in an open Gateway shipping box. Several unlabeled VHS tapes

were in or near the box. Melissa viewed two or three of the tapes on a television next to the box and found that they all showed the same woman changing clothing from different camera angles. She then realized the tapes had been recorded in the photography studio's changing room and on investigation found two hidden cameras in the room.

Melissa took sixteen tapes, including those she had viewed, to the Highland police station. She told Sergeant Michael O'Donnell and Detective Tim Towasnicki that she and David lived in the house, that David operated a photography studio from the home, and that she had found videotapes in the basement of the home that David had secretly recorded of women undressing in his studio's changing room. O'Donnell and Towasnicki viewed several tapes randomly selected from the sixteen. They ran a check of David's driver's license which revealed an outstanding arrest warrant in another county.

Melissa agreed to accompany Towasnicki, O'Donnell, and two other officers to the residence where David was arrested on the outstanding warrant. After David was taken to the police station, Melissa executed a written consent to a warrantless search of the residence for "video equipment and electronic devices/computer disks located at basement studio and surrounding area(s) to include main floor area(s)."[1] Melissa then took O'Donnell and Towasnicki to the basement and showed them the Gateway box, the VCRs, the television, and the

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[1] After this case was briefed, the United States Supreme Court ruled in Georgia v. Randolph, 2006 U.S.LEXIS 2498, *** 33-34 (Mar. 22, 2006) that one co-occupant may not give effective consent to search shared premises when another is present at the threshold and refuses consent. The Court emphasized the narrowness of its holding: "if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy [with a co-tenant], loses out." Randolph does not affect this case because David was absent when Melissa consented.

two hidden cameras she found in the changing room. At that point, she told them that David's mother owned the house. The officers immediately stopped the search, contacted Margaret, and waited for Margaret to arrive. The search was resumed after they secured Margaret's consent.

After three additional hidden cameras were found in the changing room, the officers seized all five cameras, as well as the five recorders, and 369 VHS tapes found in three ground floor bedrooms. These included both unlabeled tapes and commercially produced tapes labeled with titles such as "Girls Gone Wild." While the officers conducted their search, Melissa burned CD copies of files from David's computer consisting of still photographs of his clients. These were also given to the officers.

David was charged with thirty-six counts of Class D felony voyeurism. The trial court denied his motion to suppress the sixteen videotapes Melissa brought to the police station and the 369 tapes the officers subsequently retrieved from the home. On interlocutory appeal, the Court of Appeals affirmed as to the tapes brought to the station and reversed as to the tapes taken from the home. Lee v. State, 826 N.E.2d 131, 136 (Ind. Ct. App. 2005). We granted transfer. Lee v.State, 841 N.E.2d 186 (Ind. 2005).

I. Fourth Amendment Challenge

David concedes that the police could lawfully seize the sixteen tapes Melissa brought to the police station. He nonetheless argues that the Federal Constitution required police to secure a search warrant before viewing tapes other than the two or three tapes Melissa had previously watched. David raises a separate challenge to the seizure and viewing of the 369 tapes the police found in their search of the residence.

A. *Viewing of Tapes Supplied by Melissa*

David claims that he had a protected privacy interest in the content of the sixteen tapes that Melissa

delivered to the police, that the screening of the tapes constituted a government search, and that none of the exceptions to the warrant requirement are applicable. David cites the Supreme Court's decisions in Walter v. United States, 447 U.S. 649 (1980) and United States v. Jacobsen, 466 U.S. 109 (1984) which make clear that the Fourth Amendment is violated by a government inspection that exceeds the scope of a prior search by a private individual who discovers evidence.

In Walter, a securely sealed package shipped to a fictitious addressee was mistakenly delivered to another party whose employees opened the package and found individual 8mm film boxes covered with suggestive drawings and explicit descriptions of the films. 477 U.S. at 651-52. An employee opened one or two of the boxes and unsuccessfully attempted to view portions of the film by holding it up to light. Id. at 652. The films were subsequently viewed by FBI agents on a projector, leading to the indictment of a husband and wife on federal obscenity charges. Id. A plurality of the Court held that the agents' unauthorized screening of the films was an unlawful search. Id. at 654, 660. Justice Stevens, joined by Justice Stewart, held that the private party's actions had only partially frustrated the sender's expectation of privacy, that the FBI's unauthorized screening of the films constituted an additional search that went beyond the scope of the private search, and that the Fourth Amendment had been violated by the warrantless search in the absence of exigent circumstances or prior consent. Id. at 657-59.

In Jacobsen, a Federal Express employee opened a damaged package and found several plastic bags the innermost containing white powder inside a closed 10-inch tube wrapped in several pieces of crumpled newspaper. 466 U.S. at 111. A federal drug agent was summoned, but before his arrival the bags had been put back into the tube and the tube and newspapers back into the box. Apparently, when the agent examined the box, the powder was not visible until he removed the tube from

the box. Id. After the agent reopened the package, he subjected a small quantity of the white powder to a field test that identified it as cocaine. Id. at 111-12. The removal of the plastic bags from the tube and the agent's visual inspection of their contents did not exceed the scope of the earlier private search and enabled the agent to learn nothing that the Federal Express employee had not previously learned. The Court held that the government therefore infringed no legitimate expectation of privacy, and the inspection did not violate the Fourth Amendment. Id. at 120. The Court further held that the chemical test, which merely established that the already revealed white substance was cocaine, did not compromise any legitimate privacy interest. Id. at 123.

David argues that the Walter-Jacobsen line of authority required the officers to obtain a search warrant before playing the tapes Melissa had not already viewed. Specifically, he contends that Melissa viewed only two or three videotapes in the basement of the couple's home and therefore the officers' viewing of other tapes at the station exceeded the scope of Melissa's private search. Warrantless searches based on lawful consent are not unreasonable. Illinois v. Rodriguez, 497 U.S. 177, 179 (1990); Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). The private parties in Walter and Jacobsen—recipients of misdirected packages and a common carrier—had no authority to consent to the searches undertaken by government officials. Therefore, the police could go as far, but no further than those private parties had gone. Walter and Jacobsen cast no doubt upon the proposition that police, without first securing a warrant, may examine materials received from a private party well beyond any examination the private party may have undertaken when the private party has lawfully consented to the examination. See 1 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 1.8(b), p. 236 (3d ed. 1995).

Applying this principle here, we conclude that Walter and Jacobsen are unavailing. In those cases police

conducted a search of personal property under circumstances where no consent was applicable. In Walter, the sender had a reasonable expectation that the contents of the package would remain hidden from view from all but the intended recipient. The employees of the party who received the misdirected package in error were not the intended recipient, and therefore had no actual or apparent authority over the package. In Jacobsen, the sender likewise had a recognized privacy interest in the package and had entrusted it to a common carrier for the limited purpose of shipping the package to its intended recipient. Although the common carrier had authority over the package for the limited purpose of shipping it, the common carrier did not have access to the contents of the package. Because neither consent nor any other exception to the warrant requirement was applicable, the Court in Walter and Jacobsen determined that police examination of property previously examined by the private parties was limited to the scope of the private examination.

By contrast, in the present case, an exception to the warrant requirement—consent—is applicable. David had a cognizable privacy interest in the tapes because they were his personal effects contained in his home, where expectations of privacy are greatest. However, unlike the third parties in Walter and Jacobsen, Melissa had actual authority over the tapes: she shared the house with David and had full access to all rooms in the house, including the areas where the tapes were kept. It is well established that a third party may consent to a search of another's premises or property if actual authority exists. Rodriguez, 497 U.S. at 179; United States v. Matlock, 415 U.S. 164, 171 (1974). Actual authority does not turn solely on whatever property interest the third party may have in the property. It can arise from "mutual use of the property by persons generally having joint access or control for most purposes." Matlock, 415 U.S. at 171. This is explained on the ground that the consenting party could permit the search "in his own right" and also that the

defendant "assumed the risk" that a co-occupant might permit a search.Id. See also 1 LaFave, supra at § 1.8(b), p. 237 ("when one subjects her property to the joint or exclusive control of another, she has thereby assumed the risk that the other person will turn that property over to the police and allow the police to examine it further.").[2] Accordingly, by living with Melissa and taking no steps to deny Melissa access to the tapes, David assumed the risk that Melissa would take the tapes to the police station.

B. Seizure and Viewing of Tapes Found in the House

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[2] See, e.g., United States v. Marshall, 348 F.3d 281, 288-89 (1st Cir. 2003) (Defendant was suspected of theft. Defendant's girlfriend consented to search of two bedrooms the couple rented in a house and officersdiscovered VHS tapes containing child pornography. The court held the Walter rule inapplicable because the girlfriend had regular access to the tapes, the tapes were not kept in a separate area where the girlfriend lacked access or control, and therefore, the girlfriend gave lawful consent to viewing of the tapes.); United States v. Jenkins, 46 F.3d 447, 455-56 (5th Cir. 1995) (Walter limitations not applicable where government obtained videotapes from an employee who had lawful possession of his employer's tapes, had the actual authority to open the boxes containing the tapes, and had, at a minimum, apparent authority to view the tapes. The police could play the tapes without a warrant because of the employee's lawful consent.); Ex parte Hilley, 484 So. 2d 485, 491 (Ala. 1985) (After suspicion developed that the defendant might have poisoned her husband and daughter with arsenic, the husband's sister took to the police some of the defendant's effects that had been left in the sister's basement and at another location under the partial control of the sister. Police testing revealed arsenic. The court rejected a Walter challenge to the testing: "In the present case, [the sister] had the authority to possess and control the items and could rightfully consent to a complete scientific analysis, whereas the third party in Walter never had rightful possession or control of the pornographic films involved in that case and could not properly consent to an expansive search of them."); but see United States v. Runyan, 275 F.3d 449, 464-66 (5th Cir. 2001) (Defendant's estranged wife broke into defendant's ranch in defendant's absence, removed several CDs, zip and floppy disks and viewed some but not all of the files contained on the disks. Because the wife did not have authority to possess or control the items the Fifth Circuit concluded that Walter appliedand that the police had exceeded the scope of the private search when they examined disks that the private searcher did not examine.).

David brings a separate challenge to the seizure and viewing of the 369 tapes found by police in the house. David concedes that Melissa had actual authority to permit police entry into the house because she lived there and had mutual use and control of the house for most purposes. He nonetheless argues that Melissa's consent to the search of the house was ineffective to justify the seizure and warrantless viewing of the tapes police found in the home. As to the seizure, third party consent to search of a residence also justifies warrantless seizure of evidence found therein. United States v. Falcon, 766 F.2d 1469, 1474-75 (10th Cir. 1985). Of course, warrantless seizure of evidence from the home based on third party consent is limited by the scope of the consent given by the third party and any limitations on the third party's authority. In this case, Melissa consented to a search of the home for "video equipment and electronic devices/ computer disks located at basement studio and surrounding area(s) to include main floor area(s)." The VHS tapes are clearly "video equipment" and are within the scope of the consent given by Melissa. David nonetheless argues that the warrantless seizure and viewing of the tapeswas unlawful because Melissa's common authority over the house generally did not extend to the tapes. Specifically, he argues that unlabelled VHS tapes are "closed containers" under his exclusive control, that screening of their contents constitutes a separate search, and that the seizure of the tapes and the additional "search" effected by viewing them required the additional consent of their owner (David) or a third party with authority.

Following Matlock, courts have consistently recognized the principle that persons sharing premises may nonetheless retain areas or objects within their exclusive control that are not subject to search based on consent of one of the co-occupants. See 3 LaFave, supra at § 8.3(f), p. 738; United States v. Block, 590 F.2d 535, 541 (4th Cir. 1978); State v. Harris, 642 A.2d 1242, 1248 (Del. Super. Ct. 1993); State v. Williams, 616 P.2d 1178, 1180

(Or. Ct. App. 1980). David contends that the tapes here fell within this exception to that doctrine. David's argument relies heavily on our decision in Krise v. State, 746 N.E.2d 957 (Ind. 2001). In Krise, a man and woman jointly occupied a house and the man consented to a search of the premises for drugs. Id. at 959-60. Officers found a woman's purse in the bathroom, searched it, and found a leather pouch containing a small wooden case which in turn contained marijuana and methamphetamine. Id. at 960. We concluded that because the man and woman shared the home, the man could consent to search of the common areas of the house, including the bathroom. Id. at 967. However, we held that the man could not consent to the search of the purse because "inspection of closed containers that normally hold highly personal items requires the consent of the owner or a third party who has authority—actual or apparent—to give consent to the search of the container itself."Id. at 969.

David claims that unlabeled VHS tapes are "closed containers" for this purpose because the images recorded on the tapes are not visible to the naked eye and cannot be revealed without the use of a VCR. He also contends that VHS tapes, like purses or wallets, normally hold highly personal items. David's reliance on Krise is misplaced. First, we are not convinced that a VHS tape is a "container" though we note that the law in this area is sparse and unsettled. See, e.g., Runyan, 275 F.3d at 458 (assuming without deciding that computer disks are "containers"); State v. Munro, 124 P.3d 1221, 1223 (Or. 2005) (under state and federal constitutions, assuming without deciding that viewing of a videotape on a VCR constitutes a search because a videotape does not announce its contents). Even if we assumed that a VHS tape is a container, we do not agree that it normally contains personal items closely identified with a given individual. VHS tapes record and store video images. Although some images may be private in nature, VHS tapes frequently contain commercially available motion

pictures, family videos, and other material that is not regarded as reserved to a single individual and is not deemed private. Krise, on the other hand, dealt with a woman's purse, which is uniquely related to a given individual and is not ordinarily accessible by a man.

The mere fact that an object might be characterized as a "container" because it conceals its contents from view does not compel the conclusion that the "container" cannot be opened by another occupant. The relevant question is whether co-occupants exercise joint control and mutual use of the object for most purposes such that any occupant could permit inspection "in his own right." If so, the nonconsenting occupant assumed the risk of such inspection. A cooccupant may deny joint access over an object by keeping it in a place devoted to the owner's exclusive use[3] or where the object is one over which only one person normally exercises control and authority[4] or which "normally hold[s] highly personal items." Krise, 746 N.E.2d at 970. Similarly, a nonconsenting co-occupant may take steps to deny access to co-occupants to a designated area or object.[5] But in the absence of any such steps, a co-

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[3] See, e.g., Dell v. State, 2004 Alas. App. LEXIS 157, *11-12 (Alaska Ct. App. Aug. 11, 2004); State v. Vinuya, 32 P.3d 116, 132 (Haw. Ct. App. 2001); State v. Carsey, 650 P.2d 987, 991 (Or. Ct. App. 1982).

[4] See, e.g., United States v. Basinski, 226 F.3d 829, 834 (7th Cir. 2000), related proceeding vacated by Altobello v. United States, 543 U.S. 1097 (2005) (locked briefcase); United States v. Fultz, 146 F.3d 1102, 1105-1106 (9th Cir. 1998) (sealed cardboard box where defendant was homeless man and box was held by court to be analogous to luggage); United States v. Jaras, 86 F.3d 383, 389 (5th Cir. 1996) (suitcase); United States v. Welch, 4 F.3d 761, 764 (9th Cir. 1993) (purse); State v. Zachodni, 466 N.W.2d 624, 628 (S.D. 1991) (purse).

[5] See, e.g., Block, 590 F.2d at 541 (locked trunk); In re Scott K., 595 P.2d 105, 110-11 (Cal. 1979) (locked toolbox); Harris, 642 A.2d at 1250 (locked toolbox); Williams, 616 P.2d at 1180 (closed and latched stereo cassette tape case).

occupant may have mutual use and joint access to many items in the premises.

David makes two additional claims. He argues that because he owned the tapes, he retained exclusive control over them and Melissa lacked common authority over the tapes. He also claims that because Melissa had not previously viewed the 369 tapes, she did not have "joint access or control for most purposes." Neither ownership nor prior access is critical. See Matlock, 415 U.S. at 171 ("Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes . . ."). In the absence of any steps taken by David to protect the tapes from examination by Melissa, Melissa had access to the tapes even if that access had not previously been exercised by the act of watching the tapes. See, e.g., United States v. Duran, 957 F.2d 499, 505 (7th Cir.1992) (wife's consent extended to separate building on farm property husband used as a gym; wife's testimony that she could have gone in whenever she wanted shows authority, notwithstanding the fact she neither used that building nor left any of her effects there, as "[o]ne can have access to a building or a room but choose not to enter"); State v. Ford, 403 N.E.2d 512, 517-18 (Ill. App. Ct. 1980) (wife could consent to search of husband's tools in basement, as "[t]he basement was not locked and the wife was not instructed not to handle the tools" and the "mere fact that the defendant alone may have used these tools does not indicate that his wife was denied mutual use, access to, or control over them").

David contends that although Melissa had common authority over the basement, the 369 tapes removed from the ground floor were kept in three bedrooms that he specifically instructed Melissa not to enter. At the hearing on David's motion to suppress evidence, Melissa was

asked whether David ever told her not to go into the bedrooms. She responded that she had unrestricted access to one of the bedrooms and that she also had access to the other two bedrooms but that David "preferred that I didn't [go in them] because they were mostly his stuff and they were messy." She further testified that she went into those two bedrooms approximately once a month, not because of any direction from David, but because they were extremely cluttered and she found the messiness upsetting. Melissa, Sergeant O'Donnell, and Dectective Towasnicki each testified that the three bedrooms in which the tapes were found were unlocked. They testified that the rooms were extremely messy, with labeled and unlabeled VHS tapes, clothing, overflowing cardboard boxes, magazines, and loose papers covering the surfaces of furniture and the floor. The trial court found that Melissa had actual and apparent authority over the bedrooms.This finding is supported by the record. We conclude that Melissa had access to and control over the tapes because she could have viewed the tapes at any time, even if she had not previously done so. Therefore her consent was sufficient to authorize the warrantless seizure and screening of all of the tapes the police removed from the home.

II. Challenges under Article I, Section 11 of the Indiana Constitution

David also argues that the separate protection against unreasonable search and seizure provided by Article I, Section 11 of the Indiana Constitution required the police to obtain a warrant before viewing tapes Melissa brought to the police station and tapes removed from the house. David claims that challenges to third party consent brought under Article I, Section 11 are evaluated based on the existence of a third party's actual or apparent authority over the personal effect searched/seized rather than the premises where the effect is found. He argues that "focusing" on the personal effects—the VHS tapes—leads to the conclusion that

Melissa could not authorize viewing of the tapes because she did not own them and had never viewed them before. David makes no additional argument in support of his state constitutional claim.[6] We think the focus of the exclusionary rule is the reasonableness of police conduct, and find the police reliance on Melissa's apparent authority over the tapes to be reasonable. Accordingly, we hold that viewing of the videotapes did not violate the Indiana Constitution's prohibition against unreasonable search and seizure.

Conclusion

The trial court's order is affirmed. This case is remanded for resolution on the merits.

Shepard, C.J., and Dickson, and Sullivan, JJ. concur.

Rucker, J., concurs in Part I-A and dissents in Parts I-B and II with separate opinion.

Rucker, Justice concurring in part and dissenting in part.

I concur in Part I-A of the majority opinion. I dissent however to Part I-B believing there is no relevant distinction between the containers here and the containers in Krise v. State, 746 N.E.2d 957 (Ind. 2001), and Halsema v. State, 823 N.E.2d 668 (Ind. 2005). I also dissent to Part II because the relative ease with which the police could have obtained a warrant in this case rendered their warrantless search and seizure unreasonable within

[6] David also argues that the Walter-Jacobsen principle does not apply under the Indiana Constitution and therefore, under Article I, Section 11, police viewing of the tapes Melissa had already viewed in the basement constituted a new search requiring a warrant. Given our conclusion that the Walter-Jacobsen line of authority is inapplicable where, as is the case here, a third party possesses authority over an object and may lawfully consent to a government inspection of the object, we need not reach this issue. However, where a private search is not justified by prior third party consent, we conclude that the state constitution would not require police to obtain a search warrant to conduct an inspection that went no further than an earlier private search.

the meaning of Article I, Section 2 of the Indiana Constitution.

FOR PUBLICATION

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IN THE
COURT OF APPEALS OF INDIANA

DAVID JEFFREY LEE,

Appellant-Defendant,

vs. No. 45A05-0405-CR-267

STATE OF INDIANA,

Appellee-Plaintiff.

APPEAL FROM THE SUPERIOR COURT OF LAKE COUNTY
The Honorable Salvador Vasquez, Judge
Cause No. 45G01-0306-FD-113

April 27, 2005
OPINION – FOR PUBLICATION

MATHIAS, Judge

David Lee's ("Lee") Motion to Suppress was denied in the Superior Court of Lake County. Lee appeals, raising the following two restated issues for review:

I. Whether the Indiana Constitution permitted the police, without first obtaining a search warrant, to view videotapes that were previously viewed by Lee's fiancée; and,

II. Whether the Fourth Amendment permitted the police, without first obtaining a search warrant, to view videotapes that were not previously viewed by Lee's fiancée.

Concluding the police were only permitted to view the videotapes that had already been viewed by Lee's fiancée, we affirm in part, reverse in part, and remand.[7]

Facts and Procedural History

Margaret Lee ("Margaret") owns a home in Highland, Indiana. Margaret's son, Lee, and his fiancée, Melissa Koczur ("Koczur"), are the sole occupants of Margaret's home. Lee operates a photography studio in the basement of this home, and Koczur assisted Lee in operating this studio.

While not in Lee's studio, Koczur spent most of her time in the kitchen and living room, and Koczur slept in the living room. Tr. p. 5. Koczur very rarely went into the bedrooms of Lee's residence and was told by Lee that he preferred that she not go in the bedrooms because they were extremely unkempt. Tr. p. 17. Occasionally, the doors to Lee's bedrooms were locked when Koczur attempted to gain access to them. Id.

On May 10, 2003, Koczur went into Lee's basement and noticed an open box of videotapes and stacked videocassette recorders. Koczur viewed one of these

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[7] We heard oral argument in this matter on March 24, 2005 at Ball State University. We thank Ball State for its hospitality in hosting the oral argument and commend counsel on the quality of their presentations.

tapes, and found that it contained images of a girl undressing in the changing room of Lee's studio. Koczur viewed two other tapes, which depicted the same girl at different angles.

Koczur took the tapes she had viewed, as well as thirteen others that were nearby, to a local police station where she told Officer Michael O'Donnell ("Officer O'Donnell") that she lived with Lee, she and Lee operated a photography studio, she had found the videotapes she had with her, and those videotapes showed that Lee was secretly filming women undressing in his studio's changing room.[8] Officer O'Donnell, without first obtaining a search warrant, viewed the three tapes that had already been viewed by Koczur and ran Lee's drivers license, which revealed that Lee had an outstanding warrant from Parke County.

Koczur, Officer O'Donnell, and Officer Timothy Towasnicki ("Officer Towasnicki") drove to Lee's residence. Lee was at his residence when the officers arrived and was immediately arrested and removed from his residence. The officers then had Koczur sign a consent form and began a warrantless search of Lee's residence.

After the search began, Koczur advised Officer Towasnicki that Lee's mother, Margaret, owned the home. Officer Towasnicki immediately informed Officer O'Donnell that they needed to stop searching. After obtaining Margaret's consent, the officers resumed their search and discovered five hidden cameras in the changing room of Lee's studio, five videocassette recorders, and 369 videotapes in boxes in Lee's bedroom. Koczur did not own any of these tapes and had not seen them before the day in question. Tr. pp. 7-8, 11-12.

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[8] Koczur was visibly upset when she presented the tapes, and our review of the record leads us to believe Officer O'Donnell understood Koczur had not seen the tapes before the day in question and claimed no ownership interest in them. Tr. p. 117.

On June 5, 2003, Lee was charged with thirty-six counts of Class D felony voyeurism.[9] On February 18, 2004, Lee filed a motion to suppress. The trial court denied Lee's motion but certified its order for interlocutory appeal. This court has since acquired jurisdiction.

I. Standard of Review

The denial of a motion to suppress is reviewed similar to a sufficiency claim. Bell v. State, 818 N.E.2d 481, 484 (Ind. Ct. App. 2004). We will not reweigh the evidence or judge witness credibility but, instead, consider all uncontradicted evidence together with the conflicting evidence that supports the trial court's decision. Id.

II. Admissibility of the Videotapes Previously Viewed by Koczur

Lee concedes that the Fourth Amendment did not require the police to obtain a search warrant before viewing the three videotapes previously viewed by Koczur. Br. of Appellant at 17 (citing United States v. Jacobsen, 466 U.S. 109, 116-18 (1983) (the police may examine what has already been examined by a private citizen)). Rather, Lee contends that the separate and additional protection against unreasonable search and seizure under Article One, Section Eleven of the Indiana Constitution required the police to obtain a warrant before viewing the tapes already viewed by Koczur. We disagree.

In Bone v. State, a computer repairman discovered child pornography on one of his customer's computers and called the police to investigate. 771 N.E.2d 710, 712-13 (Ind. Ct. App. 2002). Upon arrival, the police had the repairman show them the images in question without first obtaining a search warrant. Id. Bone concluded that the Indiana Constitution allowed the police to view the images already viewed by the repairman without first obtaining a search warrant. Id. at 715. In so holding, Bone stated:

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[9] Ind. Code § 35-45-4-5 (2004).

[The] right to be free from unreasonable searches and seizures under the Indiana Constitution is a right judged upon the standard of "the reasonableness of the official behavior." However, the protection is also from "official and not private acts." . . . Here a private party saw what he believed to be child pornography, which he showed to police, and we do not read Shepherd [v. State, 690 N.E.2d 318 (Ind. Ct. App. 1997), trans. denied,] to hold that a warrant was first required to be obtained in order for the police to view that which [the repairman] had seen. Id. (quoting Moran v. State, 644 NE.2d 536, 539, 540 (Ind. 1994) (internal citations omitted)).

Bone's holding controls the issue before us, and the police were allowed to view the three videotapes already viewed by Koczur without a search warrant.

III. Tapes Not Viewed by Koczur

However, our conclusion is not transferable to the tapes which Koczur had not previously viewed. There is a well-established Fourth Amendment privacy interest in filmed images like videotapes. In Walter v. United States, the Supreme Court concluded that the warrantless police viewing of film violated the Fourth Amendment. 447 U.S. 649, 654 (1980). In so holding, the Court stated: Even though the cases before us involve no invasion of the privacy of the home . . . we are nevertheless persuaded that the unauthorized exhibition of the films constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy. It was a search; there was no warrant; the owner had not consented[.] Id.[10] See also Cortese v. Black, 1996 U.S.

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[10] The State contends Walter is not controlling because it is a plurality opinion and only two justices recognized a Fourth Amendment privacy interest in videotapes. We disagree. The justices concurring in result agreed with the majority's contention that Walter had a right to privacy concerning the films. Walter, 447 U.S. at 654, 660 ("the Government's warrantless projection of the films constituted a search that infringed petitioners' Fourth Amendment interests"). Although Justice Marshall concurred in the judgment without issuing a written opinion, he could not have agreed to suppress the films without recognizing a Fourth Amendment privacy interest in them. Id. at 660.

App. LEXIS 15311 (10th Cir. 1996) (applying Fourth Amendment protections to videotapes); Rice v. Grecar, 1996 U.S. App. LEXIS 6120 (6th Cir. 1996); United States v. Jenkins, 46 F.3d 447, 452-61 (5th Cir. 1995); United States v. Simpson, 904 F.2d 607, 610 (11th Cir. 1990).

Under Walter, the police review of the videotapes not previously viewed by Koczur presents us with a "search within a search" or a "container search" conducted during the otherwise consented-to search of Lee's home. Clearly, Koczur and Margaret's authority and consent permitted the officers to search Lee's residence without a warrant. However, neither Koczur's nor Margaret's authority extended to the viewing of the contents of the private containers, Lee's videotapes, that Koczur had not viewed herself. And for Fourth Amendment purposes, each unmarked videotape was just such a private container.

Our supreme court recently gave Fourth Amendment consideration to the limits of third-party consent to the search of containers encountered during the search of a home in Halsema v. State, 823 N.E.2d 668 (Ind. 2005). In that case, our supreme court stated:

> Because Ritchie Halsema enjoyed the exclusive use of at least one of the dresser drawers in Whiteley's bedroom and because Whiteley specifically advised the officers of that fact, Whiteley did not have actual authority to consent to a search of the drawer where the methamphetamine was found, nor could an officer reasonably believe that she had such authority. In sum, the record here shows that Whiteley had neither the apparent nor actual authority to consent to a search of the dresser drawer. Thus the warrantless search of the drawer without Ritchie Halsema's consent violated his Fourth Amendment right against unreasonable search and seizure.

Id at 677; see also Krise v. State, 746 N.E.2d 957, 971 (Ind. 2001) ("Tungate gave a voluntary consent to the general search of the home which he shared with Krise and had authority to do so. However, the State has

not proven that Tungate had mutual use of or joint access to Krise's purse").[11]

The State asserts that, because the videotapes were in open boxes in Lee's bedrooms, Koczur had the ability to view them and the police were permitted to rely upon Koczur's consent. However, the purse searched in Krise was found in the open on the top of a commode. Krise, 746 N.E.2d at 960. If third-party consent is insufficient for a container sitting on top of a commode in a room to which the consenting party had access, it must also be insufficient for a container in a room to which Koczur was occasionally locked out of and was told by the

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[11] The State claims a defendant does not have the same privacy interest in unmarked videotapes as he or she would in a purse or dresser. However, we believe that an unmarked tape could well contain information that would be even more private than that expected to be found in a dresser or in a purse. Furthermore, as discussed above, there is a recognized Fourth Amendment privacy interest in a videotape.

The State points to the legitimacy of field tests of powder, later discovered to be cocaine by law enforcement officers. However, the State's example is distinguishable from the case at bar, as well as from Krise and Halsema, because the Fourth Amendment privacy interest in an unmarked videotape is considerably greater than the lesser privacy interest in visible powder. See Krise, 746 N.E.2d at 969 ("the type of container is of great importance in reviewing third-party consent search cases. Absent one of the well-delineated exceptions to the warrant requirement, '[a] container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant.'") (quoting United States v. Jacobsen, 466 U.S. 109, 120 n.17 (1984)).

We acknowledge that the decision in Halsema was by a three-to-two vote of the court, although we note that Halsema involved containers within containers, thereby differing from the facts before us. We also recognize merit in Chief Justice Shepard's dissent, joined by Justice Dickson. The containers involved in Halsema and in Krise differed in their attributes of privacy and with regard to whether valid access by others to the containers was clearly demonstrated. Nevertheless, the videotape cassette containers in our case, as to Koczur and Margaret, were not accessible without a violation of Lee's right to privacy. Accordingly, the consent present in Halsema and alleged in Krise is not present in the case before us except as to the three tapes viewed by Koczur and taken by her to the police.

person having authority over the room that he preferred that she not enter it. See Tr. p. 17.

It might also be argued that a purse or dresser is distinguishable from a videotape because a purse and a dresser belong to a specific individual whereas an unmarked videotape might be intended for general household consumption. However, Officer O'Donnell admits that he assumed Koczur had not seen the videotapes before the day in question. Tr. p. 117. The fact that the videotapes were not stored in a manner consistent with common availability for entertainment viewing, the unmarked nature of the videotapes, and the circumstances surrounding Koczur's discovery and presentation of the videotapes to Officer O'Donnell would lead a reasonable person to the same conclusion reached by Officer O'Donnell. Officer O'Donnell's conclusion undermines the possibility that a reasonable person might believe Lee's tapes were meant to be generally available to Koczur or Margaret for household consumption,[12] and Krise and Halsema are controlling.

The State does not claim exigent circumstances, and the fact that the police had probable cause to believe that the unmarked videotapes at issue contained illegal images does not justify the warrantless police review of the unmarked videotapes. See Halsema, 823 N.E.2d at 676 ("Generally, a search warrant is a prerequisite to a constitutionally proper search and seizure."). A law enforcement official's determination that probable cause

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[12] This fact is particularly dispositive. Had Koczur given the officers reason to believe the videotapes were subject to general household consumption, the outcome of this case might well be different. However, warrantless access to the contents of a container subject to Fourth Amendment protection is improper when based upon the consent of an individual who was only recently made aware of the container's existence and does not own the container and when circumstances lead to the conclusion that the container was not intended for general consumption. This is particularly true when the police have, as they had in this case, the ability to acquire consent from the container's owner or to obtain a warrant without risk of destruction of the evidence sought.

exists for a search does not negate the need for a neutral and detached magistrate to independently confirm probable cause and to authorize state intrusion into containers subject to Fourth Amendment protection. Otherwise, the protective language of the Fourth Amendment and of Article One, Section Eleven of the Constitution of Indiana would be meaningless.

Under the facts and circumstances of this case, the State's assertion of apparent or actual authority for Koczur and Margaret's consent to search the unmarked videotapes must fail, and the trial court's decision to admit the videotapes that had not previously been viewed by Koczur must be reversed.

Conclusion

Without first obtaining a warrant, the police were only permitted to view the videotapes Koczur had previously viewed.

Affirmed in part, reversed in part, and remanded. BAILEY, J., and SULLIVAN, J., concur.

CLERK
SUPREME COURT, COURT OF APPEALS, AND TAX COURT
STATE OF INDINA
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Cause Number

BENJAMEN MURPY
3620 WEST 80TH LANE
MERRILLVILLE, IN 46410

45S05-0510-CR-00454
Lower Court Number:
45G010306FD113
Court of Appeals No:
45A050405CR00267

Fax Number: 219-769-2991

LEE, DAVID JEFFREY –V- STATE OF INDIANA

Your are hereby notified that the SUPREME COURT has on this 9/22/06 APPELLANT'S PETITION FOR REHEARING DENIED, WITHOUT OPINION.

RANDALL T. SHEPARD, CHIEF JUSTICE
ALL JUSTICES CONCUR, EXCEPT RUCKER,J., WHO VOTES TO GRANT REHEARING

KM

WITNESS my name and the seal of said Court,
this 22nd day of SEPTEMBER, 2006.

/s/_____
Clerk, Supreme Court, Court of Appeals and Tax Court